STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
E. Thomas Fitzgerald, PJ, Donald E. Holbrook, Jr and Mark J. Cavanagh, JJ.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

LORD SHAWN RUSSELL,

Defendant-Appellant.
_____/

Supreme Court No. 122998

Court of Appeals No. 230382

Circuit Court No. 99-7860-FH

KENT COUNTY PROSECUTOR
Attorney for Plaintiff-Appellee

STATE APPELLATE DEFENDER OFFICE
Attorney for Defendant-Appellant

DEFENDANT-APPELLANT'S BRIEF ON APPEAL
(ORAL ARGUMENT REQUESTED)

STATE APPELLATE DEFENDER OFFICE

BY: **JACQUELINE J. McCANN (P58774)**
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, MI 48226
(313) 256-9833

TABLE OF CONTENTS

TABLE OF AUTHORITIES i

STATEMENT OF JURISDICTION iii

STATEMENT OF QUESTION PRESENTED iv

STATEMENT OF FACTS 1

I. WHERE LORD SHAWN RUSSELL IS INDIGENT, REQUESTED TO HAVE NEW COUNSEL APPOINTED, AND DID NOT UNEQUIVOCALLY WAIVE HIS RIGHT TO COUNSEL AND AGREE TO REPRESENT HIMSELF, HIS CONVICTION SHOULD BE REVERSED BECAUSE OF THE STRUCTURAL ERROR THAT HE WAS NOT REPRESENTED BY A LAWYER AT TRIAL 8

SUMMARY AND REQUEST FOR RELIEF 15

TABLE OF AUTHORITIES

CASES

Carnley v Cochran, 369 US 506; 82 S Ct 884, 8 L Ed 2d 70 (1962) 11

Cuyler v Sullivan, 446 US 335; 100 S Ct 1708; 64 L Ed 2d 333 (1980) 9

Delaware v Van Arsdall, 475 US 673; 106 S Ct 1431; 89 L Ed 2d 674 (1986) 13

Faretta v California, 422 US 806; 95 S Ct 2525; 45 L Ed 2d 562 (1975) 9, 10, 13

Gideon v Wainwright, 372 US 335; 83 S Ct 792, 9 L Ed 2d 799 (1963) 9, 13

Johnson v Zerbst, 304 US 458; 58 S Ct 1019; 82 L Ed 1461 (1938) 11, 13

Ornelas v United States, 517 US 690; 116 S Ct 1657; 134 L Ed 2d 911 (1996) 8

People v Adkins, 452 Mich 702; 551 NW2d 108 (1996) 8, 9, 11, 12

People v Anderson, 398 Mich 361; 247 NW2d 857 (1976) 9, 10

People v Barrera, 451 Mich 261; 547 NW2d 280 (1996) 8

People v Dennany, 445 Mich 412; 519 NW2d 128 (1994) 9

People v Duncan, 462 Mich 47; 610 NW2d 551 (2000) 13

People v Lane, 453 Mich 132; 551 NW2d 382 (1996) 13

People v Lord Shawn Russell, 254 Mich App 11; 656 NW2d 817 (2002) 1, 12

People v Payne, 27 Mich App 133; 183 NW2d 371 (1971) 11

People v Ratliff, 424 Mich 874; 380 NW2d 42 (1986) 12

Powell v Alabama, 287 US 45; 53 S Ct 55; 77 L Ed 158 (1932) 9

Satterwhite v Texas, 486 US 249; 108 S Ct 1792; 100 L Ed 2d 284 (1988) 14

Stano v Dugger, 921 F2d 1125 (11th Cir.) 13

United States v Cronic, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984) 13

United States v Martin, 25 F3d 293 (CA 6, 1994) 11; 13

CONSTITUTIONS, STATUTES, COURT RULES

US Const, amends V, VI, XIV 9

Const 1963, art 1, §13 9

Const 1963, art 1, §§17, 20 9

MCL 763.1 9

MCR 6.005(D) 9, 10

STATEMENT OF JURISDICTION

A jury convicted Defendant-Appellant in the Kent County Circuit Court on July 13, 2000. A Judgment of Sentence was entered on September 11, 2000. The Circuit Court filed a Claim of Appeal and appointed the State Appellate Defender Office as counsel on October 11, 2000 pursuant to the indigent defendant's request for the appointment of appellate counsel received September 18, 2000, as authorized by MCR 6.425(F)(3). The Court of Appeals affirmed Defendant-Appellant's convictions in a published opinion on November 8, 2002. This Court granted Defendant-Appellant's delayed application for leave to appeal in an order dated July 3, 2000. This Court has jurisdiction in this appeal as provided for by Const 1963, art 1, sec 20, art 6, secs 1 and 4; MCL 600.308(1); MCL 770.3; MCR 7.203(A); MCR 7.204(A)(2); MCR 7.301(A)(2).

STATEMENT OF QUESTION PRESENTED

I. **WHERE LORD SHAWN RUSSELL IS INDIGENT, REQUESTED TO HAVE NEW COUNSEL APPOINTED, AND DID NOT UNEQUIVOCALLY WAIVE HIS RIGHT TO COUNSEL AND AGREE TO REPRESENT HIMSELF, SHOULD HIS CONVICTION BE REVERSED BECAUSE OF THE STRUCTURAL ERROR THAT HE WAS NOT REPRESENTED BY A LAWYER AT TRIAL?**

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

Introduction

Defendant-Appellant Lord Shawn Russell was charged in an amended information with one count of possession with intent to deliver less than 50 grams of cocaine and one count of possession with intent to deliver less than 50 grams of heroin, MCL 333.7401(2)(a)(iv). See Amended Information; 26a. After a four-day jury trial before the Honorable Donald A. Johnston, in Kent County Circuit Court, Mr. Russell was convicted as charged. The trial judge sentenced him as an habitual offender, MCL 769.12, to consecutive terms of two and one-half to forty years in prison. See Judgment of Sentence; 74a.

Mr. Russell appealed by right to the Court of Appeals, arguing that he was denied his right to counsel at trial and at sentencing. In a published opinion, the Court of Appeals affirmed Mr. Russell's convictions, but remanded for resentencing and correction of the presentence report. People v Lord Shawn Russell, 254 Mich App 11; 656 NW2d 817 (2002); 75a-81a.

Trial

At the beginning of proceedings July 10, 2000, Defendant Russell's appointed counsel, Damian Nunzio (P47319), said that Russell "has been unhappy with my representation and wishes, I still believe today even on day of trial, wishes that counsel remove himself." T 7/10/00, 4; 34a. Judge Johnston inquired into the matter. T 7/10/00, pp 3-40; 33a-70a. Russell stated that this was his first time before Judge Johnston, but that he had given timely notice of his

dissatisfaction with Nunzio in writing to the court but received no response.[1] Id. at 4-5, 10, 14; 34a-35a, 40a, 44a. Russell confirmed that he was dissatisfied with Nunzio's representation, including that Nunzio had not communicated adequately with him, had not obtained documents Russell wanted, had not filed motions Russell wanted, and had not moved his case forward in a timely manner. Id. at 5-6; 35a-36a.

The Judge noted that Russell had previously been represented by Paul Mitchell (P32296), who was then replaced by Nunzio, that both attorneys were capable and well-respected, and that Nunzio had already told the judge that "he thought there was a good defense that could be pursued if you would work with him on it." Id. at 7; 37a. The Judge told Russell that he would appoint a new lawyer if there was some valid reason beyond personality difficulties. Id. at 7, 37a. The Judge stated, "failing that", there were four options available: (1) Russell could retain his own lawyer, "and I will allow that lawyer to substitute right now;" (2) he could go forward with Mr. Nunzio; (3) he could represent himself; or (4) Russell could represent himself with Nunzio available as a legal advisor on technical legal points, a variation of option 3. Id. at 7-8; 37a-38a. The Judge cautioned Russell strongly against representing himself because "a trial involves issues of complicated legal procedure" and "there are many pitfalls there for the unwary." Id. at 8; 38a.

Russell repeated that he did not want Nunzio to represent him. Id. at 9-11; 39a-41a. The Judge said that Russell's options then were to retain counsel or to represent himself with Nunzio

[1] The Circuit Court file contains several letters from Mr. Russell. Three stamped as received on April 6, 2000, May 10, 2000, and June 1, 2000, pre-trial, that reference Attorney Nunzio are directly relevant to this issue. (24a-25a, 27a-32a). (There are also some references to Attorney Mitchell.) In the April-stamped letter, Mr. Russell complains about lack of contact and asks the court to forward a letter to Mr. Nunzio because he does not have his mailing address. (24a-25a). In the May-stamped letter, Mr. Russell requests the appointment of substitute counsel, discusses his complaints about Nunzio, and requests a hearing on the matter. (27a-29a).

available as a legal advisor. T 7/10/00, pp 11-13; 41a-43a. The Judge cautioned Russell that "a man who acts as his own counsel has a fool for a client" and "also has a fool for a lawyer." Id. at 12; 42a.

But, the Judge promised to guard Russell's rights and give him the opportunity to present his defense, if he wished to represent himself. Id. at 12; 42a. Russell responded, "Well, that's putting words in my mouth." Id. at 12; 42a.

The Judge repeated the options and stated: "[Y]our options are really kind of limited." Id. at 13; 43a. Russell replied, "The State has an obligation to give me representation." Id. at 13; 43a.

The Judge stated that the State had already given Russell two attorneys. Id. at 13; 43a. The Judge and Mr. Russell discussed who was responsible for the removal of his first appointed attorney, Paul Mitchell. Mr. Russell asserted that he had not removed Mitchell from the case, but that the Court had removed him. The Judge stated that he assumed Mitchell had asked to be removed due to a breakdown in the attorney-client relationship and had probably done so at Russell's request. Mr. Russell disputed that.[2] Id. at 13-14; 43a -44a.

---

[2] The record in this regard is not completely clear. Mr. Russell had concerns regarding Attorney Mitchell that stemmed from the August 11, 1999 preliminary examination. The District Court adjourned the preliminary examination because the lab report had not been produced. The Court indicated it would reconvene at a later date for testimony regarding the lab report or a stipulation to its admission and for closing arguments. (Preliminary Examination 8/11/99, 3, 37-38; 11a-13a). Court was adjourned at 4:42 pm without any determination as to probable cause on the record. (Id. at 40; 14a). Yet, on that same day, the District Court entered the "Return to Circuit Court", indicating the preliminary examination had been held and the defendant bound over on one count of possession with intent to deliver less than 50 grams of cocaine. (Return to Circuit Court, 8/11/99; 15a). The original Information was entered on September 14, 1999. (16a.)

On October 8, 1999, Mr. Russell filed a pro per "Motion to Dismiss for Untimely Preliminary Examination, Adjournment". (17a-18a.) In it, Mr. Russell complains that to date neither he nor counsel has been called back for the continuation of the preliminary examination and thus his bind over was improper. Id. On November 15, 1999, Mr. Russell filed a "Notice" asking the Attorney Mitchell be removed. (19a.) In a related document, Mr. Russell complained that the District Court adjourned his preliminary examination, never reconvened, and yet he was bound over. (20a.) [*Continued on next page.*]

Mr. Russell went on to state again that he had tried to talk with Damian Nunzio, but there was "a breakdown in communication." T 7/10/00, pp 15-16; 45a-46a. Mr. Nunzio said that he had attempted to communicate with Russell. Id. at 16; 46a. Nunzio stated that he was prepared and capable of trying the case. Id., at 16-17; 46a-47a. Nunzio acknowledged that there was a "breakdown" or "different point of view" between him and Russell with respect to "how counsel is proceeding to trial", but he did not know if that amounted to "technically a breakdown in the relationship." Id. at 17; 47a. Nunzio reiterated that he was ready to proceed with the trial at that point. Id. at 17; 47a. The judge noted that he did not discern any problem on Nunzio's part with Russell and declared that he did not know what Russell's problem was with Nunzio. Id. at 17; 47a.

Mr. Russell made mention of a grievance against Nunzio. But Mr. Nunzio had not received a grievance and neither he nor the Judge had knowledge of one being filed. Id. at 18; 48a.

---

2 cont.'d. From October 22, 1999 to February 24, 2000, there are no docket entries in the Circuit Court. (Circuit Court Docket Entries; 1a-5a).

On February 24, 2000, the Circuit Court entered an order "that this case is remanded to 63rd District Court for a finding of fact and determination on bindover." (21a). There is a District Court Docket entry on March 20, 2000 that indicates Attorney Mitchell is to file a motion to withdraw as counsel. (6a-8a). [There is no motion to withdraw in the court records provided to appellate counsel and no docket entry indicating that one was filed.] On March 24, 2000, the Circuit Court entered an order substituting Attorney Nunzio in Attorney Mitchell's place. (22a).

Apparently, in the mean time, the lab report had come back and indicated that there are two controlled substances, cocaine and heroin. There is a preliminary examination held on March 29, 2000 and Mr. Russell was bound over on two counts of possession with intent to deliver, one for each type of substance. (Return to Circuit Court, 3/29/00; 23a) An amended Information was entered on April 7, 2000. (26a).

Mr. Russell's letter, date stamped received April 6, 2000, contained in the Circuit Court records, indicated that Attorney Mitchell eventually admitted "neglect" and "nonprogress" on his case in regard to the original preliminary examination and bind over. But it indicates that at that point Mr. Russell had not wanted him removed because it would only cause further delay in his case. (24a).

The discussion continued on in a similar vein as above. There was more discussion regarding Mr. Russell's complaints about Mr. Nunzio. Id. at 18-25; 48a-55a. The Judge noted that he did not see any indication that Nunzio was not representing Russell properly. Id. at 20; 50a.

Mr. Russell reiterated, "I don't want any contact with Mr. Nunzio," and again requested Nunzio's removal and the appointment of new counsel. Id. at 26-27; 56a-57a. The Judge said that no reasonable basis had been shown for Nunzio to be removed and Russell could either work with Nunzio "or else we're going to start this case and you can represent yourself." Id. at 27; 57a.

The Court took a 20-minute recess. Id at 28-29; 58a-59a. Some documentation was provided to Mr. Russell. Id. at 29-36; 59a-66a. Mr. Russell indicated that he spoke with Nunzio for about 5 minutes during the recess. Id. at 30; 60a. The Judge offered him more time. Id. at 30; 60a.

Mr. Russell complained that he and Nunzio "can't have a decent conversation." Id. at 35; 65a. The Judge stated: "[T]he problem, whatever it is, is of your creation, Mr. Russell", Id. at 37; 67a.

> "[a]nd if you can't cooperate with the man, then you can try the case yourself, and that's fine. You have a constitutional right to do it. I don't think it's a good idea, but I'm here to guarantee your constitutional rights. And if you want to try your case yourself, by goodness, that's what we're going to do." T 7/10/00, p 38; 68a.

Mr. Russell responded, "Well, that's what you keep insisting that I do, and I'm telling you that I need a competent counsel - - " Id. at 38; 68a.

The Judge told Mr. Russell that they would take a break and when they reconvened with the prospective jurors he would either tell the jurors that Russell was representing himself or Russell could have Mr. Nunzio represent him "in the normal fashion." Id. at 40; 70a. The Judge indicated that the jury room would be made available to Russell and Nunzio during the break "if they wish to spend time on this." Id. at 40; 70a.

When court reconvened an hour and a half later for voir dire, nothing was said about Mr. Russell's decision, and voir dire was held with Mr. Russell representing himself. Id. at 41; 71a. Russell remarked to the jury panel during voir dire, "they forced me to go on with this trial alone by myself," Id. at 65; 72a. Mr. Russell represented himself through trial, including arguments and questioning witnesses, and at sentencing.

The jury found Mr. Russell guilty as charged of the two counts of possession with intent to deliver cocaine and heroin. T 7/13/00, p 82; 73a.

Appeal

Mr. Russell appealed by right to the Court of Appeals. Mr. Russell raised three issues, arguing that: 1) he was entitled to a new trial where his right to counsel at trial and the associated court rule were violated; 2) alternatively, he was entitled to a resentencing where his right to counsel and the associated court rule were violated at sentencing; and 3) he was entitled to a corrected presentence report.

The Court of Appeals held that Mr. Russell was not entitled to a new trial:

> The prosecutor argues that defendant's conduct and refusal to accept representation by appointed counsel constituted a knowing and intelligent waiver of his constitutional right to counsel. We agree with the prosecutor. [Russell, supra at 13; 76a].
>
> * * *

> The record demonstrates that defendant was thoroughly advised of the risks of self-representation and was repeatedly advised that if he chose to reject court-appointed counsel, his options were self-representation or to retain counsel. Defendant made his unequivocal choice, not by **explicitly** demanding to represent himself, but **implicitly** by repeatedly rejecting representation by court-appointed counsel in the face of numerous warnings and advice to the contrary. (Emphasis added). [(Id. at 17; 78a)].

The Court of Appeals went on to hold that the trial court failed to comply with MCR 6.005(E) at the sentencing proceeding and that Mr. Russell had been denied his right to counsel at sentencing. The Court of Appeal remanded for resentencing with appointed counsel. Id. at 18-22; 79a-81a. The Court of Appeals also ordered correction of the presentence report. Id. at 22; 81a.

Mr. Russell sought leave to appeal the Court of Appeals' affirmation of his convictions to this Honorable Court. This Court granted him leave to appeal. (Supreme Court's Order, July 3, 2002; 82a). Additional facts may be discussed where pertinent to the issue raised herein.

I. WHERE LORD SHAWN RUSSELL IS INDIGENT, REQUESTED TO HAVE NEW COUNSEL APPOINTED, AND DID NOT UNEQUIVOCALLY WAIVE HIS RIGHT TO COUNSEL AND AGREE TO REPRESENT HIMSELF, HIS CONVICTION SHOULD BE REVERSED BECAUSE OF THE STRUCTURAL ERROR THAT HE WAS NOT REPRESENTED BY A LAWYER AT TRIAL.

A. ISSUE PRESERVATION AND STANDARD OF REVIEW.

This issue was preserved by Defendant Russell's request for appointed counsel and the trial court's decision that Defendant Russell would represent himself. Mr. Russell also noted at the beginning of trial that he had the right to have appointed counsel represent him. T 7/10/00, pp 13, 27; 43a; 57a. Because this issue involves questions of constitutional law and interpretation of the court rules, the standard of review on appeal is de novo, i.e., without deference to any ruling in the court below. Ornelas v United States, 517 US 690, 697, 699; 116 S Ct 1657; 134 L Ed 2d 911 (1996); People v Barrera, 451 Mich 261, 268; 547 NW2d 280 (1996).

B. DISCUSSION.

The facts involved in this issue have been set out in the Statement of Facts, supra, and will only be summarized here. Defendant Russell is indigent and requested to have new counsel appointed in place of Attorney Nunzio. The trial court did not address his concerns until the first day of trial.[3] T 7/10/00, pp 4-5, 10, 14; 34a-35a, 40a, 44a; See also footnote 1, supra. During their discussion, Mr. Russell repeatedly stated that he wanted counsel, T 7/10/00, pp 13, 27, 38; 43a, 57a, 68a, and never stated that he wanted to represent himself. In fact, during voir dire he complained to the prospective jurors, "they forced me to go on with this trial alone by myself."

[3] This was not a case like People v Adkins, 452 Mich 702, 730; 551 NW2d 108 (1996), in which Defendant Adkins was seen to be "intentionally stalling and manipulating the courtroom proceedings", having never expressed any problems with his attorney's representation at numerous pretrial proceedings.

Id. at 65; 72a. Mr. Russell represented himself at trial, including arguments and questioning witnesses, and at sentencing.

The right to represent oneself is guaranteed by the Michigan and Federal constitutions and by statute. Faretta v California, 422 US 806; 95 S Ct 2525; 45 L Ed 2d 562 (1975); Const 1963, art 1, §13; MCL 763.1. However, a criminal defendant should not be forced to represent himself when he does not wish to do so. Mr. Russell did not unequivocally waive his right to counsel and agree to represent himself, and his conviction should be reversed because of the structural error that he was not represented by a lawyer. US Const, Ams V, VI, XIV; Const 1963, art 1, §§17, 20; MCR 6.005(D) and (E); Gideon v Wainwright, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963); People v Adkins (After Remand), 452 Mich 702; 551 NW2d 108 (1996); People v Dennany, 445 Mich 412; 519 NW2d 128 (1994); People v Anderson, 398 Mich 361; 247 NW2d 857 (1976).

A criminal defendant is entitled to the effective assistance of counsel whether he is represented by a retained or court-appointed attorney. US Const, Ams VI, XIV; Const 1963, art 1, §20; Cuyler v Sullivan, 446 US 335, 344-345; 100 S Ct 1708; 64 L Ed 2d 333 (1980). The defendant "requires the guiding hand of counsel at every step in the proceedings against him." Gideon v Wainwright, supra at 372 US at 345, quoting Powell v Alabama, 287 US 45, 69; 53 S Ct 55; 77 L Ed 158 (1932). Throughout this case Mr. Russell has been indigent and entitled to have a court-appointed lawyer represent him at public expense. E.g., Gideon, supra; See Order For Court Appointed Counsel and Orders Withdrawing Counsel And Appointing Successor Counsel; 9a-10a, 22a.

The United States Supreme Court has explained that for a defendant to waive representation by counsel and to represent himself, the defendant's request must be an unequivocal voluntary exercise of informed free will. See Faretta, 422 US at 835. In People v Anderson, 398 Mich 361, 367-368; 247 NW2d 857 (1976), this Court laid out the requirements to ensure this:

> First, the request must be unequivocal. This requirement will abort frivolous appeals by defendants who wish to upset adverse verdicts after trials at which they were represented by counsel.
>
> * * *
>
> Second, once the defendant has unequivocally declared his desire to proceed pro se the trial court must determine whether the defendant is asserting his right knowingly, intelligently, and voluntarily. (citations omitted). The trial court must make the pro se defendant aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with open eyes. (citation omitted).
>
> * * *
>
> The third and final requirement is that the trial judge determine that the defendant's acting as his own counsel will not disrupt, unduly inconvience and burden the court and the administration of the court's business.

See also MCR 6.005(D).[4]

Caselaw and constitutional principles require substantial compliance with the requirements of the rules concerning waiver of the right to counsel in order for the defendant to represent himself:

---

[4] **Appointment or Waiver of a Lawyer.** . . . The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first

(1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and

(2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

> "Substantial compliance requires that the court discuss the substance of both Anderson and MCR 6.005(D) in a short colloquy with the defendant, and make an express finding that the defendant fully understands, recognizes, and agrees to abide by the waiver of counsel procedures. The nonformalistic nature of a substantial compliance rule affords the protection of a strict compliance rule with far less of the problems associated with requiring courts to engage in a word-for-word litany approach."
> [People v Adkins (After Remand), 452 Mich 702, 726-727; 551 NW2d 108 (1996).]

Defendant Russell never stated on the record that he was waiving his right to appointed counsel and that he wished to represent himself; in fact, as was cited above, he stated that he wanted counsel and was being forced to represent himself. A defendant's waiver of his fundamental rights must be made "intelligently and understandingly." Carnley v Cochran, 369 US 506, 516; 82 S Ct 884; 8 L Ed 2d 70 (1962). Courts indulge every reasonable presumption against waiver of fundamental constitutional rights. "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." Johnson v Zerbst, 304 US 458, 464; 58 S Ct 1019; 82 L Ed 1461 (1938). "Presuming waiver from a silent record is impermissible." Carnley v Cochran, supra, 369 US at 516. In addition, see Adkins, supra, 452 Mich at 721.

This Court, citing Faretta among others, has recognized: "The presumption against waiver is in large part attributable to society's belief that defendants with legal representation stand a better chance of having a fair trial than people without lawyers." Adkins, supra at 721.

Here, the Courts should have indulged every assumption against Defendant Russell's alleged waiver of the right to be represented by appointed counsel. Expressions of dissatisfaction with trial counsel and requests for substitute counsel should not be interpreted or treated as motions to proceed pro per. United States v Martin, 25 F3d 293, 296 (CA 6, 1994); People v Payne, 27 Mich App 133; 183 NW2d 371 (1971). Here, the Circuit Judge should either

have appointed new counsel to represent Mr. Russell or simply kept Damian Nunzio as the lawyer.[5]

This Court has stated that: **"Where a defendant, for whatever reason, has not unequivocally stated a desire for self-representation, the trial court should inform the defendant that present counsel will continue to represent him."** Adkins, supra, 452 Mich at 722, n18 (Emphasis added).[6] Also, in People v Ratliff, 424 Mich 874; 380 NW2d 42 (1986), this Court remanded for a new trial holding: **"Where as here the defendant has not unequivocally stated that he desires to represent himself, he should be notified that appointed counsel will continue to represent him."** (Emphasis added).

Instead, the Court of Appeals in this published opinion held that where a criminal defendant objects to the particular counsel appointed to him and requests substitute counsel, a trial judge may find that the defendant has made an "**implicit**" "unequivocal choice" to proceed in propria persona. People v Lord Shawn Russell, 254 Mich App 11, 17; 656 NW2d 817 (2002) (emphasis added). This is truly a dangerous precedent that erodes the right to counsel and a fair trial:

---

[5] Attorney Nunzio stated that he was ready and able to go forward as full fledged counsel at trial. T 7/10/00, pp 16-17; 46a-47a.

[6] This Court similarly wrote in Adkins that:

> "If a judge is uncertain regarding whether any of the waiver procedures are met, he should deny the defendant's request to proceed in propria persona, noting the reasons for the denial on the record." Adkins, supra at 118-119 (citing People v Ratliff, 424 Mich 874; 380 NW2d 42 (1986).
>
> * * *
>
> "In short, if a judge does not believe the record evidences a proper waiver, the judge should note the reasons for his belief **and require counsel to continue to represent the defendant**. Adkins, supra at 721 (Emphasis added).

> While the right to self-representation is related to the right to counsel, the right to self-representation is grounded more in considerations of free choice than in fair trial concerns. Faretta, 422 US at 834, 95 S Ct at 2540. Thus, the right to self-representation does not implicate constitutional fair trial considerations to the same extent as does an accused's right to counsel. See Stano v Dugger, 921 F2d 1125, 1143 (11th Cir.)(The right to counsel . . . is preeminent over the right to self-representation and must be waived affirmatively to be lost, while the latter does not attach unless and until it is asserted.")
>
> [United States v Martin, 25 F3d 293, 295 (CA 6, 1994)]

The trial court's keeping Nunzio on the case in the capacity of legal advisor does not excuse the error:

> "The presence of standby counsel does not legitimize a waiver-of-counsel inquiry that does not comport with legal standards. The presence of standby counsel is not recognized as an exception to the Anderson or court rule requirements." People v Lane, 453 Mich 132, 138; 551 NW2d 382 (1996).

Further, Mr. Nunzio's service as legal advisor was not remotely akin to representing Russell, as Nunzio did not examine any witnesses or make the opening statement or give closing argument.

The error here is of the type that is "so fundamental and pervasive that they require reversal without regard to the facts or circumstances of the particular case." Delaware v Van Arsdall, 475 US 673, 681; 106 S Ct 1431; 89 L Ed 2d 674 (1986). As this Court recently stated:

> "Structural errors ... are intrinsically harmful, without regard to their effect on the outcome, so as to require automatic reversal. ... Such an error necessarily renders unfair or unreliable the determining of guilt or innocence. ... [S]tructural errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." People v Duncan, 462 Mich 47, 51-52; 610 NW2d 551 (2000); citations omitted.

Many constitutional errors can be harmless, but deprivation of counsel at a critical stage of the proceedings such as trial is structural, requiring automatic reversal without regard to normal standards of prejudice or harmless error. E.g., Gideon, supra; Johnson, 304 US at 463; United States

v Cronic, 466 US 648, 658-659; 104 S Ct 2039; 80 L Ed 2d 657 (1984); Satterwhite v Texas, 486 US 249, 256-257; 108 S Ct 1792; 100 L Ed 2d 284 (1988).

Because of the structural error here, this Court must reverse Defendant Russell's convictions and remand for a new trial where there will be appointed counsel representing him. The Court of Appeals holding that a criminal defendant may *implicitly* waive his constitutional rights to counsel by requesting substitute counsel in a way that displeases the trial judge is a dangerous precedent that this Court should not let stand.

SUMMARY AND REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant **LORD SHAWN RUSSELL** asks this Honorable Court to reverse the Court of Appeals' affirmation of his convictions and remand for a new trial.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: 

JACQUELINE J. McCANN (P58774)
Assistant Defender
3300 Penobscot Building
645 Griswold
Detroit, Michigan 48226
(313) 256-9833

Date: August 27, 2003